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No. 87-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED, and FIREMAN'S FUND INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT FIREMAN'S FUND INSURANCE CO.

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QUESTIONS PRESENTED

1. Whether this Court should review a decision wherein the Second Circuit Court of Appeals upheld admiralty jurisdiction over a freight forwarding contract involving an ocean shipment of goods and where petitioner has failed to show any conflict between the decision of the Second Circuit Court of Appeals and the decisions of this Court and of the other federal courts of appeals.
2. Whether it is necessary to decide the issue of admiralty jurisdiction over petitioner, J.E. Bernard, inasmuch as the District Court had pendent party jurisdiction over petitioner.
3. Whether this Court should review a decision of the Second Circuit Court of Appeals holding that an ocean bill of lading containing the phrase "ON DECK SHIPPER'S RISK" is not a clean bill of lading as a matter of law, wherein the Second Circuit's ruling is supported by precedent and where there is no conflict between this decision and those of other circuits or of this Court on this matter.

THE RULE 28.1 STATEMENT

Respondent Fireman's Fund Insurance Company was, at the time of the commencement of this litigation, a wholly owned subsidiary of American Express Corporation but became a publicly held corporation in October, 1985.

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BRIEF IN OPPOSITION OF RESPONDENT FIREMAN'S FUND INSURANCE CO.

STATEMENT OF THE CASE

Respondent Fireman's Fund Insurance Company makes the following additions to the statement of the case contained in Bernard's petition. First, Bernard was retained to secure clean on board bills of lading for Ingersoll. Both the District Court and the Second Circuit Court of Appeals found that Bernard breached that primary duty. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 829 F.2d 293, 303 (2d Cir. 1987) (A 17a-18a).[1] Second, Bernard's main obligations were not shoreside in Illinois. Rather, Bernard's undertaking to secure clean on board bills of lading included the obligation to monitor the loading process in New Orleans to ensure that the proper bills would be issued. *Ingersoll, supra* at 305 (A 21a).

Third, as noted in the District Court opinion, Bernard raised the issue that the District Court lacked subject matter jurisdiction for the first time in its post-trial brief in chief. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 619 F.Supp. 493, 502 (D.C.N.Y. 1985) (A 53a). Finally, the Second Circuit Court of Appeals affirmed Fireman's Fund's right of subrogation against Bernard and Taiwan for all amounts paid to Ingersoll with the exception of attorneys' fees and litigation expenses. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 829 F.2d 293, 308-09 (2d Cir. 1987) (A 20a-30a).

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[1] Appendix page references are made to the appendix contained in Bernard's petition.

SUMMARY OF ARGUMENT

Bernard fails to establish any reason which would compel this Court to grant a writ of certiorari. Bernard's assertion that the decision of the Second Circuit Court of Appeals conflicts with decisions of this Court and of other federal courts of appeals is contrived. Close examination of this assertion reveals that no such conflict exists. Bernard's contract is not a *Minturn*-type contract and Bernard fails to identify any authority holding that a freight forwarder of ocean cargo is encompassed within the *Minturn* exception to admiralty jurisdiction.

Moreover, a review of admiralty jurisdiction over Bernard is unnecessary as the District Court had pendent jurisdiction over Bernard.

Finally, Bernard fails to provide any support for its argument that the Second Circuit erred in defining the term "clean bill of lading". This term is well-defined under existing case law and authority which fully support the Second Circuit's decision.

REASONS FOR DENYING THE WRIT

I.

BERNARD HAS FAILED TO SHOW THAT THE SECOND CIRCUIT'S OPINION AFFIRMING ADMIRALTY JURISDICTION OVER THE CONTRACT BETWEEN BERNARD AND INGERSOLL CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS.

Supreme Court Rule 17 sets forth guiding criteria for the exercise of this Court's discretion in granting review upon a writ of certiorari. One of the foremost reasons supporting the exercise of this Court's discretion to grant review is the existence of a conflict between the circuits on the same matter of law. It is, therefore, not surprising that the primary reason advanced by Bernard as to why this Court should grant this writ is what it claims to be a conflict between the opinion of the Second Circuit Court of Appeals and "decisions of this Court and other circuits." (Bernard petition at p. 5). An examination of the cases relied upon by Bernard, however, illustrates that no such conflict exists. Accordingly, Bernard's argument of an alleged conflict to persuade this Court to exercise its discretion and grant review should be rejected.

Bernard's primary assertion is that the Second Circuit's decision "conflicts with the long standing rule that general agency contracts are not cognizable in admiralty. *Minturn v. Maynard*, 58 U.S. (17 How.) 477, 15 L.Ed. 235 (1855)." (Bernard petition at p. 5). From the outset, Bernard has misstated the rule established by the *Minturn* decision. That rule, as stated recently by Justice Blackmun in his dissenting opinion in the denial of the writ of certiorari in *Peralta Shipping Corporation v. Smith & Johnson (Ship-*

ping) Corp., 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), is specific and limited to agency contracts involving the husbanding of vessels.

> The admiralty jurisdiction of the federal courts extends generally to a transaction that " 'relates to ships and vessels, masters and mariners, as the agents of commerce.' " *Kossick v. United Fruit Co.*, 365 U.S. 731, 736, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961), quoting one E. Benedict, Admiralty 131. Notwithstanding the broad sweep of the admiralty jurisdiction, this Court, since the time of its single-page opinion in *Minturn v. Maynard*, 17 How. 477, 15 L.Ed. 235 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for "husbanding" a vessel, that is, arranging for the performance of the various services that are preliminary to maritime movement. 105 S.Ct. at 1405.

Bernard refers to this same citation for defining the *Minturn* rule (p. 5 of its petition), but uses an ellipsis after the words "general agency contracts" in order to delete the phrase "that call for 'husbanding' a vessel". This deletion presents a distorted and inaccurate view of the very narrow scope of *Minturn*.

The Second Circuit Court of Appeals' opinion upholding admiralty jurisdiction over J.E. Bernard is not in conflict with *Minturn*, as Bernard's contract with Ingersoll is not a general agency contract involving the "husbanding" of a vessel. In fact, Bernard's contract is not anything like the ship's agent contract involved in *Minturn*, where the agent for the shipowner had advanced monies for supplies and repairs to the vessel. Bernard has never claimed to be a "husbanding" agent of the vessel. Bernard is a freight forwarder who had contracted with a shipper, Ingersoll, to undertake certain tasks including the procurement of a clean on board ocean bill of lading. As will be discussed

below, both the District Court and the Second Circuit Court of Appeals closely examined Bernard's contractual duties and found them to have sufficient maritime relationship to invoke admiralty jurisdiction.

Bernard has characterized its contract with Ingersoll as a *Minturn*-type contract in an attempt to capitalize on and expand the debate surrounding the continued vitality of the *Minturn* rule. Bernard cites to Justice Blackmun's opinion dissenting from the denial of certiorari in the *Peralta* case (p. 7 of its petition) for the proposition that confusion over the *Minturn* rule is a reason why this Court should grant certiorari. This is a peculiar argument as Justice Blackmun's comments in *Peralta* call for the elimination of the *Minturn* exception to admiralty jurisdiction, while Bernard advocates the expansion of that exception. Justice Blackmun, taking note of the mounting criticism of the *Minturn* rule, stated that "*Minturn* has been criticized widely and severely because it excludes so much that obviously concerns maritime transactions." *Peralta Shipping, supra* at 1406. Bernard's inferences notwithstanding, Justice Blackmun clearly does not share Bernard's view that *Minturn* should be expanded.

Moreover, whether there exists a conflict between the circuits regarding the continued vitality of the *Minturn* rule is wholly irrelevant to Bernard's petition. The District Court and the Second Circuit Court of Appeals have both held that Bernard's contract is not the type of contract addressed by *Minturn*. The District Court and the Second Circuit Court of Appeals have both examined Bernard's contract in detail and have ruled that, as a freight forwarder, its contractual duties were sufficiently maritime in nature to invoke federal admiralty jurisdiction. This is a crucial finding of the courts below and Bernard offers no authority that that finding is in conflict with the decisions of this Court or of other federal courts of appeals.

Judge Carter in the District Court opinion pointed out that federal courts have traditionally exercised admiralty jurisdiction over shippers claims against freight forwarders, citing *Reid v. Fargo*, 241 U.S. 544, 545-46, 36 S.Ct. 712, 713, 60 L.Ed. 1156 (1916), *The Cayo Mambi*, 1 F.Supp. 116, 117 (E.D.N.Y. 1932), *aff'd.*, 62 F.2d 791 (2d Cir. 1933), and others. *Ingersoll Milling Machine Company v. M/V Bodena*, 619 F.Supp. 493 (D.C.N.Y. 1985) at 503. The District Court found that the "[p]reparation and processing the bill of lading, the export declarations and payment of the ocean freight 'were clearly maritime and necessary' for the shipment by ocean voyage to Korea". 619 F.Supp. at 503. (A 54a).

The Second Circuit Court of Appeals specifically discussed this point in affirming jurisdiction against Bernard. It stated:

> While we decline to lay down a general rule that freight forwarders are always subject to admiralty jurisdiction, we do hold, for reasons discussed below, that in this instance, Bernard's freight forwarding contract with Ingersoll involved enough tasks of a non-preliminary nature to support admiralty jurisdiction.
>
> * * *
>
> Specifically, we note that the district court found that Bernard's obligation with regard to the bills of lading was twofold. First, Bernard was engaged to secure clean on board bills of lading. Additionally, on receipt of the bills of lading, Bernard was to review the copies it received and to advise Ingersoll if in fact they were not clean. 619 F.Supp. at 502. Bernard's duty to secure clean bills of lading is akin to the issuance of bills of lading themselves. An obligation to procure a bill of lading for an ocean shipment, in our view, is a contract relating to transportation by sea. The procurement of the proper papers and documents

> relating to a shipment by sea is an essential and integral part of the shipping process; a contract to obtain those papers, therefore, falls squarely within the admiralty jurisdiction of the federal courts. *Ingersoll Milling Machine Company v. M/V Bodena*, 829 F.2d 293 (2d Cir. 1987) at 301-03.

Bernard suggests that the Second Circuit's decision below is in conflict with the Eleventh Circuit's decision in *E.S. Binnings, Inc. v. M/V Suadi Riyadh*, 815 F.2d 660 (11th Cir. 1987), and with the Second Circuit's own opinion in *Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corp.*, 739 U.S. 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985). Once again, it is clear upon a reading of both cases that the contracts in question in those cases involved vessel husbanding services so as to fall neatly within the ambit of the *Minturn* rule. As Bernard does not assert that its contract with Ingersoll involved, in any way, vessel husbanding, it is impossible to see how the case at bar is in conflict with these decisions. Stripped of these alleged conflicts, Bernard presents to this Court in its petition for certiorari nothing more than a prayer for this Court to enlarge upon the *Minturn* exception to admiralty jurisdiction. This, it might be pointed out, is an opportunity that this Court has already declined in *Peralta*, where, unlike here, a true *Minturn*-type contract was involved.

There are no conflicts as described in Rule 17(a) and the issue presented by Bernard's petition, whether this Court should expand the *Minturn* exception to admiralty jurisdiction, is not an important question of federal law so as to merit review under Rule 17(c). As pointed out above, the ground swell is for the elimination of the jurisdictional exception, not for its expansion. Accordingly, we urge this Court to deny Bernard's petition for writ of certiorari.

II.

THE DISTRICT COURT HAD PENDENT JURISDICTION OVER BERNARD.

An alternative basis of federal jurisdiction, pendent party jurisdiction, existed for Ingersoll's claims against Bernard. As there was a common nucleus of operative facts between Ingersoll's claim against Bernard and its admiralty claims against the vessel owner and charterer, the District Court had the power to hear the whole case. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L. Ed.2d 218 (1966). *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

Having found independent admiralty jurisdiction over Ingersoll's contract with Bernard, neither the District Court nor the Second Circuit Court of Appeals found it necessary to address the issue of pendent jurisdiction. Bernard's only discussion of this issue is in a footnote. (Bernard petition at pp. 7-8, fn. 1).

Bernard claims that the exercise of pendent jurisdiction would deny its right to a jury trial. Bernard, however, admits that it did not even file a jury demand. (Bernard petition at p. 8, fn. 1). Bernard asserts, without benefit of authority, that it should be excused from filing a jury demand as it relied upon Rule 38(e) of the Federal Rules of Civil Procedure. Bernard is mistaken. The failure to file a jury demand is a waiver under Rule 38(d) of the Federal Rules of Civil Procedure, even when a party is contesting admiralty jurisdiction. *Leather's Best, Inc. supra*, at 811, fn. 12 provides:

> [I]nsofar as third-party practice has relevance to the question of pendent jurisdiction in this case, we are not faced with any problem of denial of the right to jury trial since Tidewater made no such demand below. See F.R.Civ. P. 38(d).

It is clear that Ingersoll's claim against Bernard is pendent to Ingersoll's admiralty claims against other defendants. It is equally clear that the exercise of pendent jurisdiction over Bernard would not serve to deprive Bernard of a trial by jury, as Bernard waived that right by electing to not file a jury demand. Under these circumstances, this Court can conclude that the District Court, in the absence of admiralty jurisdiction, would have exercised pendent party jurisdiction over Bernard. The recognition of pendent jurisdiction would render further review of admiralty jurisdiction over Bernard unnecessary.

III.

THE DECISION OF THE SECOND CIRCUIT AFFIRMING THE DISTRICT COURT'S RULING THAT AN ON DECK BILL OF LADING IS NOT A CLEAN BILL OF LADING IS AMPLY SUPPORTED BY EXISTING PRECEDENT AND NEED NOT BE REVIEWED BY THIS COURT.

The second and final reason advanced by Bernard for the granting of a writ of certiorari is that the Second Circuit Court of Appeals erroneously defined "clean bill of lading" and that this term is an important and undecided question of federal law. What Bernard fails to acknowledge is that the Second Circuit Court of Appeals relied upon extensive precedent directly on point in affirming the District Court on this issue. Moreover, Bernard has failed to produce any case authority which would support Bernard's position that an on deck bill of lading can still be a clean bill of lading.

The Second Circuit Court of Appeals' opinion contains a specific section entitled " 'Clean' on Board Bills of Lading". *Ingersoll, supra* 829 F.2d at 303-304 (A 18a-20a). Authority in support of the finding that an on deck bill of lading is not a clean bill of lading includes *The*

Delaware, 81 U.S. (14 Wall.) 579, 602, 20 L.Ed. 779 (1871), *Seguros Banvenez S.A. v. S.S. Oliver Drescher*, 761 F.2d 855, 859 (2d Cir. 1985), and *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 59 (2d Cir. 1985).

Bernard does not cite to any contrary authority and does not allege any conflict in decisions of other federal courts of appeals on this issue. Rather, Bernard makes an unsupported allegation at page 10 of its petition that the Second Circuit refused to consider evidence of the parties' and the trade's customary use of the term. Not only is this allegation unsupported, it is in error. Footnote six of the Second Circuit's opinion makes a specific reference to trade custom and usage. "The meaning of a 'clean' bill of lading is one firmly established by the custom and practice of the maritime industry." *Ingersoll, supra* at 304 fn. 6.

Bernard urges that the Second Circuit should have looked to "Incoterms" as reflective of the parties' usage and asserts that the "Incoterms were incorporated into the contract in this case". (Bernard petition at p. 10). This allegation is unsupported and inappropriate as there is no evidence in the record that Incoterms were part of any contract to which Bernard was a party.

In sum, Bernard has failed to show that the term "clean bill of lading" is not sufficiently defined under existing case law and has further failed to raise any legitimate reason which would compel this Court to review this issue.

CONCLUSION

For all of the reasons stated above, this Court should deny J.E. Bernard's petition for a writ of certiorari.

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